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October 19, 2005

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Assembly Bill 648/Senate Bill 315: Avery Task Force Legislation

On September 2, 2005, Assembly Bill 648 (AB 648) was introduced and referred to the Assembly Committee on Judiciary. The bill would make a variety of changes to procedures relating to the interrogation of juveniles and adults suspected of having committed certain crimes, the admissibility of statements in court arising from those interrogations, and the conduct of eyewitness identification procedures. AB 648 would also revise the time limits on sexual assault related prosecutions, the requirements for the retention of physical evidence containing biological material, and the procedures for ordering certain post-conviction DNA tests to be performed.

On September 20, 2005, Assembly Amendment 1 (AA 1) to AB 648 was adopted by the Assembly Committee on Judiciary on a vote of 7-0, and AB 648 was subsequently recommended for passage, as amended by AA 1, on an identical vote of 7-0. On September 27, 2005, AB 648, as amended by AA 1 and by AA 2, was passed by the Assembly on a vote of 96-0 and was immediately messaged to the Senate. On September 30, 2005, AB 648 was referred to the Joint Committee on Finance.

On September 2, 2005, Senate Bill 315 (SB 315) was also introduced and is the companion bill to AB 648. SB 315 was referred to the Senate Committee on Judiciary, Corrections, and Privacy. On September 15, 2005, Senate Amendment 1 (SA 1) to SB 315 was adopted by the Senate Committee on Judiciary, Corrections, and Privacy on a vote of 5-0. SA 1 to SB 315 is identical to the provisions of AA 1 to AB 648. SB 315 was subsequently recommended for passage, as amended by SA 1, on a vote of 5-0. On October 4, 2005, SB 315 was referred to the Joint Committee on Finance.

This summary describes the provisions of AB 648, which has already passed the Assembly. The provisions described below are identical in every respect to those contained in SB 315, as

amended by SA 1. However, AB 648, as passed by the Assembly, now differs from SB 315, as amended by SA 1, in that the language added by AA 2 to AB 648 has not been added to the Senate version of the legislation.

SUMMARY OF BILL

Recording Juvenile Interrogations

On July 7, 2005, the Wisconsin Supreme Court held in *State v. Jerrell* that custodial interrogations of juveniles must be electronically recorded when feasible and when the interrogation occurs in a place of detention must be recorded without exception. Provisions of this bill are intended to bring state statute into conformity with this recent court decision.

Under AB 648, a law enforcement agency would generally be required to make an audio or audio and visual recording of any custodial interrogation of a juvenile that was conducted at a place of detention.

For the purposes of this general requirement, the following definitions would be included in the bill. A "custodial interrogation" would be deemed to be an interrogation by a law enforcement officer or an agent of a law enforcement agency of a person suspected of committing a crime. The custodial interrogation would be considered to run from the time the suspect is informed of his or her rights to counsel and to remain silent until the questioning ends, during which the officer or agent asks a question that is reasonably likely to elicit an incriminating response and during which a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way. A "law enforcement agency" is defined under current law [s. 165.83(1)(b) of the statutes] and is a governmental unit of one or more full-time employees of the state or one of its political subdivisions engaged in preventing and detecting crime and enforcing state laws or local ordinances, and who are vested with the power of arrest. Under current law [s. 165.85(2)(c) of the statutes], an employee of such an agency is deemed a "law enforcement officer."

If feasible, a law enforcement agency would also generally be required to make an audio or audio and visual recording of any custodial interrogation of a juvenile that was conducted at a place other than a place of detention (a secure detention facility, jail, municipal lockup facility, secured correctional facility, a police or sheriff's office, or other building under the control of a law enforcement agency where juveniles are held in custody in connection with an investigation of a delinquent act). Under the bill, a statement (which could be oral, written, in sign language, or in the form of nonverbal communication) made by a juvenile during a custodial interrogation would generally not be admissible in evidence against the juvenile in a case alleging the juvenile to be delinquent, unless an audio or audio and visual recording of the interrogation was made and was available.

Under the bill, the law enforcement officer or agent conducting a custodial interrogation would not be required to inform the individual that the officer or agent was making an audio or audio and visual recording of the interrogation. A juvenile's lack of consent to having an audio or audio and visual recording made of a custodial interrogation would not affect the admissibility in evidence of a recording of the juvenile's statement during the interrogation.

Notwithstanding the general requirement under the bill to record juvenile interrogations, a juvenile's unrecorded statement would still be admissible in evidence if any of the following applied: (1) the juvenile refused to respond or cooperate in the custodial interrogation if an audio or audio and visual recording was made of the interrogation so long as a contemporaneous audio or audio and visual recording or written record was made of the juvenile's refusal; (2) the statement was made in response to a question asked as part of the routine processing after the juvenile was taken into custody; (3) the law enforcement officer or agent conducting the interrogation in good faith failed to make a recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating; (4) the statement was made spontaneously and not in response to a question by a law enforcement officer or agent; or (5) exigent public safety circumstances existed that prevented the making of a recording or rendered the making of such a recording infeasible.

These provisions governing the recording of juvenile interrogations would first apply to custodial interrogations on the effective date of the bill.

Recording Custodial Interrogations of Felony Suspects

The bill would establish as the policy of the state the requirement that an audio or audio and visual recording be made of a custodial interrogation of a person suspected of committing a felony unless certain conditions applied or good cause was shown for not making a recording of the interrogation. [See the following section for a description of the exceptions that would be created to this general rule.]

A law enforcement officer or agent conducting a custodial interrogation would not be required to inform the subject of the interrogation that the officer or agent was making an audio or audio and visual recording of the interrogation.

These provisions would first apply to custodial interrogations conducted on or after January 1, 2007.

Grant Program for the Purchase of Recording Equipment for Law Enforcement Interrogations

Under the bill, the Department of Administration's Office of Justice Assistance (OJA) would be required to provide grants to law enforcement agencies to fund or reimburse expenses incurred

on or after July 7, 2005. The grants could be used for: (1) the purchase, installation, or maintenance of digital recording equipment for making audio or audio and visual recordings of custodial interrogations; or (2) training personnel to use such equipment. Grant funding could be utilized to support the recording of custodial interrogations of either juveniles or adults and of interrogations related to either misdemeanor or felony offenses.

AB 648 stipulates that a law enforcement agency applying for an equipment or training grant would be required to include the following information: (1) how the agency proposed to use the grant funds; (2) procedures that would be followed if recording equipment failed to operate correctly, including procedures for reporting failures, using alternative recording equipment, and repairing or replacing the equipment; (3) procedures for storing recordings of custodial interrogations, including storage format, storage location, and indexing of recordings for retrieval; (4) measures to prevent or detect tampering with recordings of custodial interrogations; and (5) any other information required by OJA.

OJA would be authorized to award more than one grant to a law enforcement agency. The Office would be required to develop criteria and procedures to administer the grant program. However, these criteria and procedures would not have to be promulgated as administrative rules.

AB 648 would create an annual, PR-funded grants for digital recording of custodial interrogations appropriation under OJA for the purpose of funding the new grant program. The appropriation would be funded from penalty surcharge revenues. The penalty surcharge receipts appropriation under the Department of Justice (DOJ) would be amended for the purpose of transferring penalty surcharge monies to the new OJA appropriation.

In order to provide additional penalty surcharge revenues to fund the new grant program, the penalty surcharge would be increased from 25% to 26% of the total fine or forfeiture imposed for most violations of state law or municipal or county ordinance. The penalty surcharge increase would first apply to acts or omissions committed on the effective date of the bill.

Admissibility of Statements in Court

Under AB 648, if a statement made by a defendant during a custodial interrogation was admitted into evidence in a felony trial before a jury and no audio or audio and visual recording of the interrogation was available, the defendant could request that the court instruct the jury that it is the policy of this state to make a recording of a custodial interrogation of a person suspected of committing a felony and that the jury could consider the absence of a recording of the interrogation in evaluating the evidence in the case. Likewise, where the case was being heard by the court, rather than by a jury, and no audio or audio and visual recording of the interrogation was available, the court could consider the absence of a recording of the interrogation in evaluating the evidence in the case. However, such a consideration of the lack of a recording could not occur where the state asserted and the court found (if the matter is a jury trial) or the court determined (where the matter is heard before the court) that one of the following conditions applied. [In matters heard before a

jury, the bill would also provide that the court could also find that good cause existed for not providing the instruction to the jury.]

The lack of a recording would not preclude the admission of a defendant's statement where: (1) the person refused to respond or cooperate in the interrogation if an audio or audio and visual recording was made of the interrogation so long as a contemporaneous recording or written record was made of the subject's refusal; (2) the statement was made in response to a question asked as part of the routine processing of the person; (3) the law enforcement officer or agent conducting the interrogation in good faith failed to make a recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating; (4) the statement was made spontaneously and not in response to a question by a law enforcement officer or agent; (5) exigent public safety circumstances existed that prevented the making of a recording or rendered the making of such a recording infeasible; or (6) the law enforcement officer conducting the interrogation (or the officer responsible for observing an interrogation conducted by an agent) reasonably believed at that time that the relevant offense in the matter was not a felony.

Under the bill, a defendant's lack of consent to making an audio or audio and visual recording of a custodial interrogation would not affect the admissibility in evidence of a recording of a statement made by the defendant during that interrogation.

Further, AB 648 would provide that an audio or audio and visual recording of a custodial interrogation would not be deemed an open record until one of the following had occurred: (1) the person interrogated was convicted or acquitted of an offense that was the subject of the interrogation; or (2) all criminal investigations and prosecutions related to the interrogation were concluded.

These provisions would first apply to custodial interrogations conducted on or after January 1, 2007.

Law Enforcement Training

AB 648 would include the recording of custodial interrogations in the statutory list of course subjects over which the Law Enforcement Standards Board would have oversight authority to establish minimum curriculum requirements for preparatory courses and programs in connection with law enforcement training.

Eyewitness Identification Procedures

The bill would require each law enforcement agency to adopt written policies for using an eyewitness to identify a suspect when viewing the suspect in person or when viewing a

representation of the suspect. These policies would have to be designed to reduce the potential for erroneous identifications by eyewitnesses in criminal cases.

A law enforcement agency would be required to consider model policies and policies adopted by other jurisdictions when fashioning its own policies. Further, the bill would require each law enforcement agency to review its eyewitness identification policies on a biennial basis.

A law enforcement agency would be required to consider including in these policies practices that would enhance the objectivity and reliability of eyewitness identifications and minimize the possibility of mistaken identifications. These practices would include the following: (1) to the extent feasible, having a person who does not know the identity of the suspect administer the eyewitness viewing of individuals or representations; (2) to the extent feasible, showing individuals or representations to the eyewitness sequentially rather than simultaneously; (3) minimizing those factors that influence an eyewitness to identify a suspect or overstate his or her confidence level in identifying a suspect (including such factors as verbal or nonverbal reactions of the person administering the eyewitness viewing); and (4) documenting the procedure by which the eyewitness views the suspect or a representation of the suspect and documenting the results or outcome of the procedure.

These provisions would first take effect on the first day of the 12th month beginning after publication of the act.

Time Limits on Sexual Assault Prosecutions

AB 648 would revise current law procedures relating to time limits on certain sexual assault related prosecutions, requirements for the retention of physical evidence containing biological material, and procedures for post-conviction DNA testing. The following sections describe these provisions of the bill. In each of the following sections, the relevant current law procedures or requirements are described first, followed by a description of changes that would be made under AB 648.

Current Law. Generally, a prosecution for first or second degree sexual assault of either an adult or a minor or for engaging in repeated acts of sexual assault of the same child must be commenced within six years of the event. A prosecution is considered commenced if: (1) a warrant or summons is issued; (2) an indictment is found; or (3) an information is filed. [An "information" is a formal criminal charge made by a prosecutor without a grand jury indictment.] Prior to the expiration of the six-year time limitation, however, if the state has collected biological material that is evidence of the identity of the person who committed the sexual assault and has identified a DNA profile from the biological material, but the comparisons of that DNA profile to those of known persons did not result in a probable identification of the person who is the source of the biological material, then the state may subsequently commence a sexual assault prosecution of the person who is the source of the biological material within 12 months after comparison of the sexual assault DNA profile has resulted in a probable identification of the person.

AB 648. For purposes of extending the time limitation on prosecutions for crimes that are related to the sexual assault as a result of the timely collection and processing of biological material, the bill would newly specify that the crimes would be considered "related" if they were: (1) committed against the same victim; (2) proximate in time; and (3) committed with the same intent, purpose, or opportunity so as to be part of the same course of conduct. Under the bill, the time limits for prosecuting crimes related to first or second degree sexual assault (of an adult or a minor) or to repeated acts of sexual assault of the same child could also be extended in the same way that the time limits for prosecuting sexual assault under current law may be extended [that is, 12 months from the date of obtaining a successful comparison of the sexual assault DNA profile]. These provisions would first apply to offenses not barred from prosecution on the effective date of the bill.

Retention of Physical Evidence Containing Biological Material

Current Law. If physical evidence in the possession of a law enforcement agency, a district attorney or a DOJ state crime laboratory includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment, the custodian of that physical evidence must generally preserve it until every person in custody as a result of the judicial action has reached his or her discharge date.

If an exhibit in a criminal action or a delinquency proceeding under the Juvenile Justice Code (Chapter 938) includes any related biological material, the court must generally ensure that the material is preserved until every person in custody as a result of the action, proceeding, or a sexually violent person commitment has reached his or her discharge date.

A court, district attorney or relevant agency may destroy the biological material before the expiration of this time period, if all of the following apply: (1) the court, district attorney or agency sends a notice of its intent to destroy the biological material to all persons who remain in custody as a result of the judicial action, and to either the attorney of record or state public defender for each person in custody; (2) no such noticed person does either of the following within 90 days of receiving the notice: (a) files a motion for testing of the biological material; or (b) submits a written request to preserve the biological material to the entity sending the notice; and (3) no other provision of federal or state law requires the court, district attorney or agency to preserve the biological material.

Any such notice must clearly inform the recipient that the biological material will be destroyed unless, within 90 days of receipt of the notice, either a motion for testing of the material is filed or a written request to preserve the material is submitted to the court, district attorney or agency. Upon receipt of any written request to preserve the material, the court, district attorney or agency must preserve the material until the discharge date of the person making the request (or on whose behalf the request was made), subject to a court order to the contrary.

AB 648. The bill would specify that the duty of a court, district attorney or agency to retain physical evidence containing biological material would run to biological material: (1) from a victim of the offense that was the subject of the criminal investigation, action, or proceeding; or (2) that could reasonably be used to incriminate or exculpate any person for the offense. Whenever a court, district attorney, or agency would be required to retain such physical evidence, the evidence would have to be retained in an amount and manner sufficient to develop a DNA profile.

Post-conviction DNA Testing

Current Law. At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a court motion for an order requiring forensic DNA testing of evidence, if: (1) the evidence is relevant to the investigation or prosecution that resulted in the judicial action; (2) the evidence is in the actual or constructive possession of a government agency; and (3) the evidence has not previously been subjected to forensic DNA testing or, where the evidence has previously been tested, it may now be tested using a scientific technique not previously available or utilized for the earlier test and that now provides a reasonable likelihood of more accurate and reliable results. A court may impose reasonable conditions on any ordered testing to protect the integrity of the evidence and the testing process. If appropriate and if stipulated to by the person making the request and the relevant district attorney, a court may order the state crime laboratories to perform the testing. A court may order the person making the request to pay the costs of any such testing where the court finds that the individual is not indigent.

If a court orders post-conviction DNA testing under these circumstances, and a state crime laboratory receives the biological material under this court order, that laboratory must analyze the DNA in the material and submit the results of the analysis to the court ordering the analysis.

AB 648. The bill would delete the current law requirement that the person making a motion for a court order for forensic DNA testing and the relevant district attorney must consent before a court may order the state crime laboratories to perform post-conviction DNA testing. Under the bill, a court could unilaterally order the state crime laboratories to perform such testing provided the underlying legal conditions for such testing were met.

AB 648 would newly provide that following consultation with the person making the motion and the relevant district attorney, a court could order that the biological material be sent for testing to a facility other than a state crime laboratory. Under such circumstances, a state crime laboratory could arrange for an outside facility to perform the testing, subject to the approval of the person making the motion and the relevant district attorney. Unless the court ordered the person requesting the test to pay for it, AB 648 would require the state crime laboratories to pay for the court-ordered testing at the outside testing facility.

If the state crime laboratories received biological material for DNA testing under the circumstances identified above, AB 648 would require the laboratories to accord such court-ordered DNA testing priority over all other work of the laboratories.

ASSEMBLY AMENDMENT 1

Assembly Amendment 1 made the following changes to the bill:

Eligible Purposes of Equipment Grants. AA 1 authorizes OJA to make grant awards for "payments made" on or after June 7, 2005, in addition to providing reimbursements for "expenses incurred" after that date.

Grant Funding. AA 1 appropriates $312,500 PR in 2005-06 and $750,000 PR in 2006-07, funded from penalty surcharge revenues, under the new OJA grants for digital recording of custodial investigations appropriation.

Forensic DNA Testing Priority at the State Crime Laboratories. AA 1 clarifies that the priority that must be given by the state crime laboratories to court-ordered forensic DNA testing must be given priority over other work at the laboratory "consistent with the right of a defendant or a victim to a speedy trial."

Nomenclature Relating to Juvenile Proceedings. AA 1 deletes an inappropriate reference to a "case" involving adjudication of a juvenile and inserts the correct term ("any court proceeding").

"Good Cause" for Admitting a Juvenile's Unrecorded Statement during a Custodial Interrogation. AA 1 provides that an unrecorded statement made by a juvenile during a custodial interrogation is not inadmissible, in addition to the provisions spelled out in the bill, if "other good cause exists for not suppressing a juvenile's statement."

Contemporaneous Recording of a Juvenile's or an Adult's Refusal to Have Recording Made of His or Her Custodial Interrogation. AA 1 clarifies that it is a law enforcement officer or agent of a law enforcement agency that would make the contemporaneous recording or make a written record of the juvenile's or adult suspect's refusal.

Consideration of the Absence of a Recording of a Custodial Interrogation. AA 1 clarifies that a jury or judge may consider the absence of such a recorded statement in evaluating that evidence "relating to the interrogation and the [defendant's] statement."

Failure to Record a Custodial Interrogation Where It is Believed that the Offense is Not a Felony. AA 1 clarifies that this exception to recording the custodial interrogation applies when the law enforcement officer or agent conducting the interrogation has reason to believe at the

"commencement" of the interrogation (rather than at the "time" of the interrogation) that the offense for which the person was taken into custody was not a felony.

ASSEMBLY AMENDMENT 2

Assembly Amendment 2 alters the definition of "custodial interrogation" to provide that such an interrogation would be considered to have started from the time the suspect is or should be informed of his or her rights to counsel and to remain silent. Under AA 2, a custodial interrogation is considered to have started even if a law enforcement officer or agent of a law enforcement agency mistakenly failed to inform a suspect of his or her rights to counsel and to remain silent.

Both AA 1 and AA 2 to AB 648 were adopted by the Assembly when it passed the bill. Both amendments are now considered as engrossed in the bill, and no separate action on them is required by the Joint Committee on Finance.

As noted in the introductory section of this memorandum, the Senate version of the bill currently in the Joint Committee on Finance (SB 315, as amended by SA 1) does not contain the language adopted by the Assembly in AA 2. If the Committee wishes to report a version of SB 315 that is identical to the legislation that passed by the Assembly, the Committee should introduce and adopt SA 2 to SB 315. SA 2 would be identical to AA 2, as adopted by the Assembly.

FISCAL EFFECT

Grant Program for the Purchase of Recording Equipment for Law Enforcement Interrogations

AB 648 would codify the requirements of the Wisconsin Supreme Court's decision in *State v. Jerrell*. For custodial interrogations occurring on and after the effective date of the bill, AB 648 would generally require a law enforcement agency to make an audio or audio and visual recording of any such interrogation of a juvenile conducted at a place of detention. If feasible, a law enforcement agency would also generally be required to make an audio or audio and visual recording of any custodial interrogation of a juvenile conducted at a place other than a place of detention.

Further, effective with custodial interrogations conducted on or after January 1, 2007, it would also generally become the policy of the state to make an audio or audio and visual recording of a custodial interrogation of a felony suspect unless certain conditions applied or good cause was shown for not making such a recording of the interrogation.

According to DOJ, there are 640 law enforcement agencies across the state that would be subject to these new requirements. It is estimated that each law enforcement agency has at least one

place of detention; however, some of the larger agencies may have multiple places of detention. In order to meet the new requirement of *State v. Jerrell*, as codified in AB 648, at least one place of detention in every law enforcement agency would have to be provided with the appropriate recording equipment. Currently, it is unknown the number of law enforcement agencies in Wisconsin that already possessed the required recording equipment prior to the Supreme Court's July 7, 2005, ruling.

Under AB 648, as passed by the Assembly, a "custodial interrogation" begins at the time a suspect is or should be informed of his or her right to counsel and to remain silent until the questioning ends, during which time a law enforcement officer or agent of a law enforcement agency asks one or more questions that are reasonably likely to elicit an incriminating response and during which time a reasonable person in the suspect's position would believe that he or she is in custody or otherwise deprived of his or her freedom of action in any significant way.

As a result of this definition under the bill, actual custodial interrogations may occur in the field as well as at places of detention. Under both *Jerrell* and the bill, law enforcement agencies must record custodial interrogations of juveniles outside of places of detention, if feasible.

Consequently, law enforcement agencies may be required to equip field officers with the equipment necessary to record custodial interrogations of juveniles. There are over 14,000 certified law enforcement officers and an estimated 5,600 squad cars in Wisconsin. It is unknown the number of law enforcement officers who actively serve in the field or the number of officers and squad cars that already possessed the required recording equipment prior to the Supreme Court's July 7, 2005, ruling.

Nonetheless, it would appear reasonable to conclude that hundreds of Wisconsin law enforcement agencies' places of detention and potentially thousands of law enforcement officers serving in the field and their squad cars will need to be equipped with audio or audio and visual recording equipment.

Under AB 648, OJA would be required to provide grants to law enforcement agencies to fund or reimburse expenses incurred or payments made since the date of the *Jerrell* decision (July 7, 2005). Eligible costs under the grant program would be for: (1) the purchase, installation, or maintenance of digital recording equipment for making audio or audio and visual recordings of custodial interrogations; or (2) training personnel to use such equipment. Grant funding could be utilized to support the recording of custodial interrogations of either juveniles or adults and of interrogations related to either misdemeanor or felony offenses. OJA would be authorized to award more than one grant to a law enforcement agency.

The bill would fund the grant program with revenue derived from an increase in the penalty surcharge. In order to generate additional penalty surcharge revenues for the program, the penalty surcharge would be increased from 25% to 26% of the total fine or forfeiture imposed for most violations of state law or municipal or county ordinance. It is anticipated that once this surcharge

increase is fully implemented, additional surcharge revenues of $750,000 annually would be generated. The bill would appropriate $312,500 PR in 2005-06 and $750,000 PR in 2006-07 from the increased penalty surcharge revenue stream to a new PR annual digital recording of custodial interrogations grant appropriation under OJA. The recommended expenditure authority for 2005-06 is based on an assumption that the bill will be enacted by late October or early November, 2005, and that the revenue stream from the increased surcharge would begin to be received by the state in early 2006. [If passage of the bill would be delayed, the expenditure authority for the new grant program in 2005-06 would likely need to be reduced to avoid a shortfall in appropriations funded by the penalty surcharge.]

It is not known whether the funding provided under the bill will be sufficient to support all of the likely requests from law enforcement agencies for grant awards. There are a number of considerations that lead to this conclusion:

- While hundreds of places of detention and thousands of law enforcement field officers and squad cars will need to be equipped with digital recording equipment, it is unknown how many were already outfitted with such equipment on July 7, 2005.

- Nonetheless, the bill does not preclude law enforcement agencies that have already outfitted their places of detention, field officers, or squad cars with digital recording equipment before July 7, 2005, from upgrading or replacing the existing recording equipment. It is unknown how many agencies in this situation would elect to upgrade or replace their equipment under the grant program or whether these types of grant requests would receive equal or lesser funding consideration compared to agencies that currently possess no such recording equipment.

- Under *Jerrell*, effective July 7, 2005, all law enforcement agencies must electronically record the custodial interrogations of juveniles "where feasible, and without exception when questioning occurs at a place of detention." It is unknown how many such agencies may submit grant funding requests both for a purchase of essential equipment to immediately satisfy the new requirement, as well as a second equipment purchase based on a long-term assessment of equipment needs. It is also unknown how law enforcement agencies will interpret the meaning of "where feasible" under the *Jerrell* ruling and whether that interpretation would have any material effect on the demand for equipment funding grants.

- The bill does not limit the amount of the grant award that may be received by a law enforcement agency when seeking reimbursement or funding for the purchase, installation, or maintenance of digital recording equipment, or for training costs associated with such equipment. Law enforcement agencies would appear to have the flexibility to opt for any number of cost solutions to meet the new digital recording requirement based on the particular mix of equipment features and capabilities the agencies are looking for.

- The state has no experience with the range of costs that will be incurred by law enforcement agencies across the state on an ongoing basis to: (1) replace and maintain the required

recording equipment; and (2) provide ongoing training on the operation and maintenance of the equipment to law enforcement personnel. Governor McCallum's Task Force on Racial Profiling did consider the installation of in-car video cameras in squad cars and reported that the average cost of such video equipment was approximately $5,000 per unit at the time. However, it is unknown whether those reported costs would be comparable to the type of equipment required for custodial interrogations.

- The grant program does not appear to provide funding for the costs associated with modifying agency record systems or purchasing new computers to store and retrieve recordings of custodial interrogations.

- The bill does not address how OJA would administer the grant program if requests for grant funding in a year exceed the funding available for grants. Since AB 648 does not authorize OJA to prorate grant award amounts based on the availability of funding, the Office would appear to have the option either of: (1) accumulating all the grant requests received in the fiscal year and making the awards to law enforcement agencies on some type of unspecified priority basis; or (2) paying the awards on a first-come, first-served basis. Under either scenario, if total funding in a fiscal year is insufficient to meet grant demand, some law enforcement agencies might be left to cover the costs associated with acquiring the recording equipment.

AB 648 appropriates no additional funding and authorizes no additional positions for OJA to administer the new grant program. OJA has indicated that start-up staffing resources of 1.0 FTE for the first year of the grant program would be required. Following the first year, 0.5 FTE ongoing position would be required to administer the program. The estimated cost of 1.0 FTE for the first year of the program is tentatively projected at $80,000, and the ongoing annual cost of the 0.5 FTE is tentatively projected at $40,000. OJA indicates that these resources would be required to initially establish the program, provide program and technical support to hundreds of law enforcement grantees for both equipment and training costs, and to administer the fiscal aspects of the program. OJA staff have advised that they would attempt to utilize currently available federal grant funding to administer this new state program; however, because of recent federal funding reductions (and federal law governing the use of federal grant funding), it is uncertain that this approach represents a feasible option for the agency.

District Attorneys

State prosecutors have indicated that the new requirements regarding the taping of custodial interrogations will increase their workload associated with reviewing the tapes, but will not reduce defense motions regarding legal objections to law enforcement interrogations. The State Prosecutors Office has advised that "the result of the juvenile taping requirement, thus far, has often been that more prosecutor time per case is needed." As a result, state prosecutors have identified a likely need of 15.0 additional prosecutor positions in Wisconsin to address this anticipated increased workload. Prosecutors have requested that the additional prosecutors be allocated to district attorney offices, as follows: (1) 4.0 attorneys to Milwaukee County; and (2) 1.0 attorney to

the following 11 counties: Brown, Dane, Eau Claire, Kenosha, Marathon, Outagamie, Racine, Rock, Sheboygan, Waukesha, and Winnebago. The annualized cost of providing 15.0 additional prosecutors would be $840,000 GPR.

Given the short period of time since *State v. Jerrell* has required changes to current interrogation procedures, the state still has very limited experience with respect to the long-term workload impact of the new recording requirement on state prosecutors. A 2004 report of the Center on Wrongful Convictions at the Northwestern University School of Law (*Police Experiences with Recording Custodial Interrogations)* found that "experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions. The record is there for defense lawyers to see and evaluate: if the officers conduct themselves properly during the questioning, there is no basis to challenge their conduct or exclude the defendant's responses from evidence. Officers are spared from defending themselves against allegations of coercion, trickery, and perjury during hostile cross examinations."

If the findings of the Northwestern University report are borne out in Wisconsin over the long run, then increased prosecutor workload associated with reviewing interrogation tapes may be offset in whole or in part by a reduction in defense motions. On the other hand, if Wisconsin prosecutors' initial experience is borne out over time, then additional prosecutors may be required.

Office of the State Public Defender

The Office of the State Public Defender (SPD) has indicated that the recording requirements could simplify criminal prosecutions by eliminating or reducing uncertainty about interrogation techniques and identification procedures. On the other hand, the SPD has raised the possibility that the new provisions could result in increased workload associated with defense attorneys investigating whether or not law enforcement complied with the new interrogation and identification procedures.

Department of Justice

AB 648 would make it easier for courts to order DOJ's state crime laboratories to perform post-conviction DNA testing. The Department has expressed the concern that this change could increase the laboratories' post-conviction DNA testing caseload without the additional funding resources to process this caseload.

The Department indicates that law enforcement agencies are increasingly collecting more evidence with DNA material in a given case and that the overall number of cases involving DNA material is also increasing. In calendar year 2000, for example, the Department opened 1,083 DNA cases. By calendar year 2004, the Department opened 1,654 DNA cases, and in the current calendar year, the agency projects that 2,060 DNA cases will be opened. DOJ advises that its current backlog of DNA cases is approximately 900. [DOJ did receive four additional DNA analysts as part of the 2005-07 biennial budget to address this DNA caseload backlog.]

The Department has indicated that the possible fiscal effect of the AB 648 provisions on the Department is difficult to predict. If the trend in the Department's overall DNA caseload continues and if the provisions of AB 648 would increase the post-conviction DNA testing caseload, DOJ may require additional resources to process these DNA cases. At this writing, however, it is unclear what impact the bill's language will ultimately have on the Department's post-conviction DNA caseload.

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